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No. 05-

IN THE

Supreme Court of the United States

THOMAS POOLE, Superintendent
FIVE POINTS CORRECTIONAL FACILITY and
ELIOT L. SPITZER, Attorney General of New York,

Petitioners,

v.

DWAYNE HENRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's decision in Williams v. Taylor logically require that a federal court first determine whether the law applied by the state courts is contrary to Supreme Court precedent before determining whether it is a misapplication of it, and, if so, is New York's ineffective-assistance-of-counsel standard contrary to Strickland?

2. Did the Second Circuit misstate and misapply the Strickland standard by erroneously equating it to a harmless error standard, which placed the burden on the State to disprove prejudice under Strickland's second prong, while Strickland specifically provides that the defendant bears the burden of affirmatively proving prejudice, and was this error compounded by the Second Circuit's failure to accord any deference on habeas review to the New York State Court of Appeals' decision rejecting defendant's ineffective-assistance-of-counsel claim?

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The order of the Court of Appeals for the Second Circuit denying the petition for panel rehearing and rehearing *en banc* is not reported. It is reprinted in the appendix of this petition at pp. 47a.

The opinion of the Court of Appeals for the Second Circuit is published at 409 F.3d 48 (2d Cir. 2005). It is reprinted in the appendix of this petition at pp. 5a-46a.

The decision of the New York State Court of Appeals is published at 95 N.Y.2d 563 (2000). It is reprinted in the appendix of this petition at pp. 1a-4a.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On October 8, 2003, Eastern District Judge Jack Weinstein denied the petition, holding that defendant had failed to demonstrate that the state courts' denial of his claim was contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668 (1984).

On May 24, 2005, the Second Circuit entered an order reversing the judgment of the district court and remanding the case for retrial.

On June 23, 2005, the State's filed a timely motion seeking rehearing and rehearing en banc, pursuant to FRAP Rule 35.

In an order dated October 21, 2005, and entered October 25, 2005, the Second Circuit denied the petition for rehearing and rehearing en banc.

This petition for certiorari is filed within ninety days of the Second Circuit's order denying rehearing, and is therefore timely. Sup. Ct. R. 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254(d) of [Chapter] 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

On August 10, 1995, just after midnight, defendant and four unapprehended accomplices robbed Mr. Richard Mitchell, a livery cab driver, at gunpoint, stealing his cab and approximately $130 in cash. Mitchell provided the police with a detailed description of defendant, and subsequently identified defendant in a lineup. Thereafter, defendant was arrested and

charged with Robbery in the First Degree (Penal Law § 160.15[4]) and Robbery in the Second Degree (Penal Law § 160.10[1]) (Queens County Indictment Number 4062/95).

State Court Proceedings

Defendant proceeded to a jury trial, at which he presented both a misidentification defense and an alibi defense. With respect to the latter, defendant's girlfriend, Lakesha Person, testified, as she had in the Grand Jury, that she had been with defendant on the night of August 10, 1995. However, at trial, the prosecutor exposed this testimony as "irrelevant," as it related to the night after the crime. Defendant was ultimately convicted of the charged crimes and sentenced to an aggregate prison term of from ten to twenty years.

On his direct appeal in state court, defendant argued that he was denied the effective assistance of counsel by his attorney's error in presenting a witness who provided an "alibi" for the wrong date. The Appellate Division reversed defendant's judgment of conviction, deeming the error ineffective per se, as it "went to the heart of the alibi." People v. Henry, 266 A.D.2d 564 (2d Dept. 1999).

The State was subsequently granted leave to appeal to the New York State Court of Appeals. People v. Henry, 2000 N.Y. LEXIS 1357 (March 22, 2000). In a unanimous decision dated December 21, 2000, the New York Court of Appeals reversed the order of the Appellate Division, reiterating that New York's standard for gauging ineffective assistance of counsel claims does have a prejudice component, and holding that defendant was not denied the effective assistance of counsel. People v. Henry, 95 N.Y.2d 563 (2000). Specifically, the Court held that "although the prosecution discredited the alibi testimony, this alone did not 'seriously compromise'

defendant's right to a fair trial" because counsel had "competently represented defendant's interests at other stages of the proceedings, and counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense," which the court characterized as the "the thrust of the defense." Id. at 566. To the contrary, the Court found that other portions of the alibi witness's testimony actually buttressed the misidentification defense. Id. The Court thus concluded that, "in view of the extensive misidentification defense and counsel's competency in all other respects . . . counsel's failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance." Id. at 556.

On March 11, 2002, defendant filed a collateral motion to vacate his conviction on the same legal grounds presented in the Court of Appeals, heightened factually by trial counsel's newly-executed affidavit stating that he had made a mistake in presenting the alibi, and did not actually realize that it related to the day after the crime. Defendant argued that this new proof effectively countered the State's argument in the Court of Appeals that counsel's decision to present the alibi testimony may have been an intentional trial gambit.

The State opposed the motion as procedurally barred on the grounds that the legal issue had been raised, and decided, on defendant's direct appeal. The State also argued that the affidavit did not constitute "newly discovered evidence" as it did not constitute evidence that could have been admitted at trial at all. Alternatively, on the merits, the State argued that defendant's claim was meritless, even accepting counsel's affidavit at face value, because his attorney's subjective intent was irrelevant to the determination of whether his decision to present the alibi was "tactical" and, in any event, the Court of

Appeals had properly ruled that counsel's mistake in this regard was non-prejudicial.

On March 26, 2002, the state Supreme Court denied the motion as procedurally barred. Defendant's subsequent motion for leave to appeal was denied.

The Proceedings in Federal Court

On May 16, 2002, defendant, through counsel, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York, reiterating his ineffective-assistance-of-counsel claim. On October 8, 2003, the district court denied the petition, holding that defendant had failed to demonstrate that the state courts' denial of his claim was contrary to, or an unreasonable application of, Strickland. Specifically, the court reasoned that a review of the record revealed that counsel had "zealously, thoroughly and effectively" represented defendant at all stages of the trial and sentencing, and that, given the evidence and the circumstances of the case, there was "no reasonable possibility that absent counsel's decision to elicit the alibi testimony the outcome of defendant's trial would have been different." (A-31). Nevertheless, the district court issued a certificate of appealability.

Defendant subsequently appealed to the United States Court of Appeals for the Second Circuit. In a decision dated May 24, 2005, and reduced to Mandate on October 26, 2005, a panel of that Court reversed the decision of the district court, holding that the New York State Court of Appeals' rejection of defendant's ineffective-assistance-of-counsel claim was an unreasonable application of Strickland under 28 U.S.C. § 2254. In reaching this conclusion, the Second Circuit reasoned that counsel's performance was deficient under Strickland's first

prong and could not be deemed a "tactic" as the State's highest court had concluded, because it is "axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force." Henry v. Poole, __ F.3d __, 2005 U.S. App. Lexis 9447, *28-29 (2d Cir. May 24, 2005). The Second Circuit also deemed the New York Court of Appeals "objectively unreasonable" in failing to consider the affirmatively harmful effect of a false alibi, and deemed Strickland's second prong satisfied, holding that, "we cannot conclude that there is no reasonable probability that the presentation of the false alibi defense affected the outcome of Henry's trial." Henry, supra, at *29. Additionally, in a lengthy discussion spanning approximately six pages, the Second Circuit clearly expressed its view that New York's standard for gauging ineffective assistance of counsel claims, is, in fact, contrary to the Strickland standard. And while the Second Circuit noted that it was bound to follow its own precedent to the contrary (Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001); Loliscio v. Goord, 263 F.3d 178 (2d Cir. 2001), its discussion certainly cast doubt on the continued vitality of those cases, and, a fortiori, on the New York standard.

On June 23, 2005, the State's filed a motion seeking rehearing and rehearing en banc, pursuant to FRAP Rule 35, on the grounds that the panel's decision conflicted both with the decisions of this Court in Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000), and with the decisions of the Second Circuit in Lindstadt v. Keane, 239 F.3d at 198 and Loliscio v. Goord, 263 F.3d at 193.

In an order dated October 21, 2005, and entered October 25, 2005, the Second Circuit denied the petition for rehearing and rehearing en banc.